

Liquor Commission of Western Australia
(Liquor Control Act 1988)

Applicant: Woolworths Limited
(represented by Mr Marcus Solomon SC, instructed by Ms Rebecca Conder of Cullen Babington Macleod Lawyers)

First Intervener: Executive Director of Public Health
(represented by Mr Joshua Berson of State Solicitor's Office)

Second Intervener: Director of Liquor Licensing
(represented by Mr Joshua Berson of State Solicitor's Office)

Objectors present at the hearing: Mr Leslie Smith
Ms Patricia Johnson

Other Objectors: City of Melville
As listed in attachment 1 to this determination

Commission: Mr Seamus Rafferty (Deputy Chairperson)
Mr Eddie Watling
Dr Eric Isaachsen

Date of Hearing: 14 March 2014

Date of Determination: 11 June 2014

**Reasons of
Determination:** 19 March 2015

Premises: Premises to be known as Dan Murphy's Bicton, situated at Melville Plaza Shopping Centre, 378 Canning Highway, Bicton.

Matter: Application for the conditional grant of a liquor store licence referred under Section 24 of the *Liquor Control Act 1988*.

Determination: The application is granted.

Attachment 1

1. Paula Sanders
2. Donald Eric and Judith Ann Truscott
3. Samantha Brown and Craig Hards
4. Pamela Tenknoff
5. Edward George Sanders
6. Stanley Harold Wallin
7. Tania Burge
8. Valerie Jennings
9. Elizabeth Sanders
10. Brian Sanders
11. Sarah Sanders
12. Paula Yvonne Prichard
13. Patricia Helen Watkins
14. Hazel Smith
15. Vasilios Giannopoulos
16. Timothy John Johnston
17. Frank Lopresti trading as the Formula Pharmacy

Authorities referred in this determination:

- *Woolworths Ltd v Director of Liquor Licensing* [2012] WASC 384
- *Woolworths Limited v Executive Director of Public Health and Director of Liquor Licensing* - LC 34/2011
- *Executive Director of Health -v- Lily Creek International Pty Ltd & Ors* [2000] WASCA 258
- *Woolworths Ltd v Director of Liquor Licensing* [2013] WASC 227

Background

- 1 On 30 August 2011, the Liquor Commission (“the Commission”) refused an application for the conditional grant of a liquor store licence in respect of premises to be known as *Dan Murphy’s Bicton* and located at 378 Canning Highway, Bicton, on the basis that there was a paucity of evidence of consumer demand needed to justify grant of the application.
- 2 Pursuant to section 28 of the *Liquor Control Act 1988* (“the Act”) the decision of the Commission refusing the grant of the application was appealed to a single judge of the Supreme Court. His Honour Heenan J in dismissing the appeal concluded that the Commission had engaged with the appellant’s case on its merits, had found all the necessary facts and had rejected the appellant’s application on the merits of the evidence before the Commission (*Woolworths Ltd v Director of Liquor Licensing* [2012] WASC 384).
- 3 The decision of Heenan J was appealed to a full bench of the Supreme Court. In upholding the appeal, His Honour Buss JA stated that:

“The Commission’s evaluation of the appellant’s case was in effect impermissibly circumscribed by its focus on whether there was a ‘general principle’ that the popularity of the Dan Murphy’s business model elsewhere justified the grant of the appellant’s application for a liquor store licence in the Bicton locality.

The correct question was whether, having regard to all of the evidence and any notorious facts, including evidence as to the reasons for the popularity of the Dan Murphy’s business model elsewhere and how those reasons related to the Bicton locality, there were consumer requirements in the Bicton locality for the range of liquor products and services which the appellant proposed to provide and whether, in all the circumstances, it was in the public interest to grant the application, particularly in order to contribute to the proper development of the liquor industry in a manner which reflected the diversity of consumer requirements.”(Woolworths Ltd supra).

- 4 The application was referred back for reconsideration by reference to the evidence already before the Commission and such further evidence as may be adduced limited to facts and circumstances which had arisen since the hearing before the Commission. A remittal hearing for this application was heard before the Commission on 14 March 2014.

Preliminary issue

- 5 At the commencement of the hearing on 14 March 2014, leave was granted to the applicant to rely upon the supplementary report from MGA Town Planners dated 12 March 2014.

Submissions on behalf of the Director of Liquor Licensing

- 6 By correspondence dated 4 November 2013, the Director of Liquor Licensing (“the Director”) advised that he did not intend to lodge any further evidence but reserved the right to respond to any such material which the applicant might seek to lodge. The Director ultimately elected not to lodge any evidence before the Commission.

Submissions on behalf of the Executive Director of Public Health

- 7 In addition to the concerns raised and noted by the Commission in its decision LC 34/2011, it was submitted by the Executive Director of Public Health (“the EDPH”), that the actual granting of a conditional liquor store licence to the applicant for the premises known as *Dan Murphy’s South Fremantle*, located at 219 Hampton Road is a significant change in circumstances in this case.
- 8 The proposed store being a “destination liquor store”, the area affected by the store is broader than the immediate 2km locality. It has been acknowledged in other proceedings by the applicant that the general trade area for such destination liquor stores is a radius of between 5km and 10km and a driving distance of approximately 7.7km.
- 9 Furthermore, the *Dan Murphy’s Bull Creek* store commenced operating in January 2013. As a result, if this application was granted, the three Dan Murphy’s “destination” liquor stores shall be equidistant from the areas experiencing most alcohol related harm in suburbs north and south of South Street such as Kardinya, Hilton, Samson, O’Connor and parts of Willagee. It was argued that this would increase the availability of packaged liquor in the area and the harm associated with the use of liquor.
- 10 In summary, the EDPH reiterated the concerns in relation to:
 - a) the availability of cheap liquor;
 - b) the large size of the premises;
 - c) the close proximity to other licensed premises; and
 - d) the associated increase in the physical and economic availability of packaged liquor.

Submissions on behalf of the City of Melville

- 11 The City of Melville was opposed to the grant of the application for such a large format liquor store which would occupy approximately 20% of the retail space occupied by Melville Plaza Shopping Centre which is a district centre. The city is concerned about the number of existing liquor outlets in the area and the possibility that another liquor outlet could contribute to incidences of anti-social behaviour, in particular in the Palmyra community which has an identified population of vulnerable children.

Submissions on behalf of objectors

- 12 Mr Leslie Smith and Ms Patricia Johnson who were both present at the hearing voiced their concerns at the “normalisation” of alcohol by the grant of this liquor store in a shopping centre and the impact on the community in general as a result of the grant of such a large destination liquor store licence.
- 13 In essence, the residential objectors are opposed to the grant of the application due to the following factors:
 - a) the area is already well serviced with liquor outlets;
 - b) there is a church and three primary schools in the local area
 - c) there will be increased vehicular traffic which may result in increased accidents;
 - d) there may be increased crime and anti-social behaviour.

Submissions on behalf of the applicant

- 14 In addition to the voluminous evidence in support of the application before the Commission at first instance and referred to in the Commission’s original decision (*Woolworths Limited v Executive Director of Public Health and Director of Liquor Licensing* - LC 34/2011), the principal “new” evidence relied upon by the applicant is the updated MGA Town Planners Report which includes the following findings:
 - a) the population in the locality has increased by 1,520 persons since the 2006 ABS Census;
 - b) the demographic profile of Bicton remains consistent;
 - c) the proportion of indigenous persons residing in the area has declined;
 - d) income levels have increased with a relatively low proportion of houses rented or mortgaged;

- e) the number of existing packaged liquor licences in the location remains the same.

Determination

- 15 The applicant seeks to open a Dan Murphy's liquor store adjacent to the Melville Plaza Shopping Centre in Bicton. The proposed liquor store will be located in an existing stand alone vacant building on the western side of the shopping centre. Following refurbishment, the building will provide approximately 1,843 m² of floor space consisting of 1,296m² of display/sales area and 547m² of storage, amenities and office space.
- 16 The Commission relies on its findings in relation to the positive aspects of this application as outlined in the decision at first instance which noted that the grant of the application would provide a number of benefits to the local community, including:
 - a) increased competition;
 - b) the introduction of a large, modern liquor store with superior customer service and product range;
 - c) the convenience to the 1.8 million visitors to the shopping centre per annum
 - d) the redevelopment of the run down building and a branded Dan Murphy's store which will appeal to older, more affluent and discerning customers.
- 17 The Commission expressly found at first instance that the application had:
 - a) no negative aspects in relation to possible ill health caused to the community;
 - b) no potential adverse impact on the existing licensed premises or the members of the public;
 - c) no issues as to the possible adverse effect on the amenity of the locality and any possibility of undue offence, annoyance or disturbance to people who reside or work in that locality.
- 18 It is therefore now critical to consider any possible negative aspect arising from the new evidence lodged before the Commission for this application. The EDPH has drawn the attention of the Commission to the grant of a new Dan Murphy's liquor store licence in South Fremantle and the commencement of another Dan Murphy's liquor store in Bull Creek since the original application was heard by the Commission on 22 June 2011.
- 19 Having regard to the specific locations of each of the Dan Murphy's liquor stores, the Commission is of the view that there is a clear delineation between the

catchment areas for all the stores and a natural barrier (Kwinana Freeway) separating them. Each store shall cater to a specific traffic flow with no connection by a major arterial road.

- 20 Whilst the grant of this application may lead to greater supply of packaged liquor, evidence before the Commission suggests that given the distinct location of the proposed stores on separate arterial roads, any migration of residential and transient consumer population for each store is going to be minimal.
- 21 No evidence was presented by the objectors or the City of Melville to substantiate their claims. Whilst the Commission is mindful of their concerns, the Commission has determined that the onus on these parties pursuant to section 73(10) of the Act has not been discharged to the requisite standard.
- 22 Each application must be considered on its merits (section 16 of the Act). It is often the case when determining the merits of an application that tension may arise between advancing the objects of the Act, particularly the objects of minimising alcohol-related harm and endeavouring to cater for the requirements of consumers for liquor and related services. When such circumstances arise, the licensing authority needs to weigh and balance those competing interests (*Executive Director of Health v Lily Creek International Pty Ltd & Ors* [2000] WASCA 258).
- 23 His Honour Martin CJ made the following relevant observation in the Court of Appeal decision:

‘...on the face of the Commission's reasons, no negative aspects of the application are apparent, whereas many positive aspects of the application are identified without adverse finding or comment. The question posed by this appeal is how, in those circumstances, consistently with the proper construction of the Act and its objects, the Commission could have concluded that it was not in the public interest to grant the application.’ (*Woolworths Ltd v Director of Liquor Licensing* [2013] WASCA 227 per Martin CJ at [7]).
- 24 Given that the evidence adduced in respect to the original application and this application have not materially changed, in light of the comments of Martin CJ, it would be perverse to refuse this application. The matters raised by the Intervenor as to the location of the three Dan Murphy's stores is a relevant consideration for the Commission, however on balance, the applicant has discharged its onus in establishing that the granting of the licence is in the public interest.
- 25 Ultimately, the Commission has concluded that the grant of this application is in the public interest, particularly in the context of catering for the requirements of consumers for liquor when regard is given to the proper development of the liquor industry.

26 Accordingly, the application is granted.

A handwritten signature in blue ink, appearing to read 'Seamus Rafferty', with a long horizontal flourish extending to the right.

SEAMUS RAFFERTY
DEPUTY CHAIRPERSON